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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536



File: WAC 02 023 55463 Office: CALIFORNIA SERVICE CENTER

MAV 28 2003
Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further consideration.

The petitioner is a corporation organized in the State of California in June 1998. It is engaged in the import, export, manufacture, and distribution of textiles. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity for the petitioner.

On appeal, counsel for the petitioner asserts that the director's decision was in error. Counsel asserts that the director mischaracterized the company's business and cited no authority to support its conclusions. Counsel also asserts that the director erred by denying the petition solely on grounds not raised in the director's request for further evidence.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -
- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially stated that the beneficiary's specific job duties included:

- 1. Acting as the primary link between the U.S. Subsidiary and the Parent Company by reporting directly to the Board of Directors of [the parent company].
- 2. Formulating and directing U.S. corporate policies and strategies to obtain optimum efficiency, economy of operations and maximization of profits; while ensuring compliance with the objectives of the Parent Company;
- 3. Playing a key role in all decision-making and business negotiations involving the Subsidiary;
- 4. Engaging in business development efforts and developing a trade and sales network to ensure the business growth of the Subsidiary [sic]
- 5. Developing administrative guidelines and regulations for the Subsidiary;
- 6. Recruiting personnel for the Subsidiary in accordance with its Business Plan [sic]
- 7. Developing human resource policies for the hiring, evaluation, training, and discharge of employees based on their performance; and supervising the operation of various departments of the Subsidiary;
- 8. Supervising all company managers and staff and exercising ultimate authority over personnel actions;
- 9. Acting as authorized signatory for the execution of contracts and/or documents;
- 10. Reviewing operating sales/ trade [sic] reports and financial statements to determine business progress toward corporate goals;
- 11. Proposing innovative ideas and plans regarding the advancement and development of the company;
- 12. Directing the import and export affairs between the United States and Taiwan;
- 13. Maintaining close contact and liaison with clients, investors and vendors in both Taiwan and

- the U.S. which will enhance the business of the Subsidiary; and
14. Keeping the Subsidiary updated with regards to changes in the market conditions of international markets and/or any other factors affecting the international markets.

The petitioner also provided brief job descriptions for the four employees under the beneficiary's supervision on the accompanying organizational chart. The petitioner indicated that the manager of the marketing, research, and development department was involved in marketing, development, research, and sales management. The sales assistant of the pre-production garment division, appearing as subordinate to the manager of the marketing, research, and development department, was involved in "Ordering follow up, Price quotation, Mfg. Prod. Order spec sheet, Sample development, Customer interaction/service, [and] Sales expansion." The manager of the administration department was involved in financial management and human resources. The accounting, human resource, and reception person was involved with accounting, office administration, purchasing, human resources, reception, and postal duties.

The director requested the petitioner's California Form DE-6, Quarterly Wage Reports to substantiate the employment of the petitioner's employees and the number of weeks the individuals worked for the petitioner. The director's request for evidence indicated that this evidence was necessary to establish the beneficiary had been or would be performing managerial or executive duties for the petitioner. The director requested other evidence unrelated to the issue of the beneficiary's managerial or executive capacity for the petitioner.

In response, the petitioner provided its California Form DE-6 for the quarter ending December 31, 2001, the quarter in which the petition was filed. The California Form DE-6 substantiated that the petitioner employed five individuals corresponding to the positions initially presented on the petitioner's organizational chart.

The director determined that the petitioner had not established a reasonable need for an executive because it was a three to four employee importer/exporter business. The director also determined that, because the company only had two to three full-time employees in addition to the beneficiary, the beneficiary would necessarily be performing numerous menial tasks. The director also determined that the beneficiary's position was essentially a first-line supervisory position over non-professional employees; thus, the beneficiary did not qualify for this visa classification as a manager. The director further determined that the petitioner had not provided sufficient evidence to establish that the beneficiary managed a function rather than performed operational activities for

the petitioner. The director concluded that the beneficiary was not a functional manager.

On appeal, counsel for the petitioner asserts that the director erred by not requesting further evidence on the beneficiary's duties in his position as president. Counsel asserts that the director is required to deny a petition if there is evidence of ineligibility; however, the director must request additional evidence to establish eligibility if the evidence submitted merely does not fully establish eligibility. Counsel asserts that the director's request for evidence on numerous issues and failure to request additional detail regarding the beneficiary's specific duties failed to give the petitioner a fair opportunity to address the director's concerns on this issue.

The regulation at 8 C.F.R. § 103.2(b)(8) states in pertinent part:

Request for evidence. If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. If the application or petition was pre-screened by the Service prior to filing and was filed even though the applicant or petitioner was informed that the required initial evidence was missing, the application or petition shall be denied for failure to contain the necessary evidence. Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence, including blood tests.

Moreover, as previously stated 8 C.F.R. § 204.5(j)(5), requires the prospective employer in the United States to furnish a job offer in the form of a statement, indicating that the alien is to be employed in the United States in a managerial or executive capacity. Additionally, the statement must clearly describe the duties to be performed by the alien. The required initial evidence, thus, is a statement that clearly describes the beneficiary's intended duties.

The petitioner's initial description of the beneficiary's duties provides a general overview of the beneficiary's duties without conveying an understanding of the beneficiary's actual daily duties and the percentage of time spent on each of those duties. The initial description of the beneficiary's duties, even when coupled with the remainder of the record, does not establish that the beneficiary's primary assignment for the petitioner will be in an executive or managerial capacity.

In addition to the director's decision not to ask for a more detailed description of the beneficiary's duties in the request for further evidence, the director based his decision in part on an improper standard. In his decision, the director stated that the petitioner did not have a reasonable need for an executive because the petitioner was only a three to four employee importer/exporter business. The director stated that this type of business did not require or have a reasonable need for an executive "because all they do is buy and sell products." This comment is inappropriate. The director should not hold a petitioner to his undefined and unsupported view of "common business practice" or "standard business logic." The director should, instead, focus on applying the statute and regulations to the facts presented by the record of proceeding. Although the Bureau must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in sales or services will not preclude the petitioner from qualifying for classification under section 203(b)(1)(C) of the Act.

The failure of the director to properly address the deficiencies of the petitioner's description of the beneficiary's duties coupled with the lack of a request for further evidence on the managerial or executive nature of the beneficiary's position requires the remand of this case. The AAO finds that the petitioner's initial description of the beneficiary's duties is not sufficient to establish eligibility for this visa classification.

Moreover, counsel's assertions on appeal do not adequately address the deficiencies of the petitioner's description of duties. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel asserts that the beneficiary's duties and responsibilities are executive duties as illustrated by an example of the beneficiary's negotiations involving a competitive program between the petitioner and another company. However, neither counsel nor the petitioner provide documentary evidence regarding the date these specific negotiations took place. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel also asserts that the beneficiary's duties are executive duties because the beneficiary negotiates major contracts and commits the petitioner to financial risk. However, it is not apparent from the record that these duties are duties that are primarily executive duties rather than the beneficiary's performance of the sales function of the petitioner. An employee who primarily performs the tasks necessary to produce a product or

to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel finally asserts that the petitioner's description of the beneficiary's subordinate employees' duties as reflected on the organizational chart shows that the beneficiary is not conducting any of the routine operational activities of the petitioner. The brief descriptions of the beneficiary's subordinate employees' duties are insufficient to establish that the beneficiary is routinely excused from performing the operational tasks of the petitioner. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The record fails to sufficiently demonstrate that the beneficiary's primary duties are executive or managerial. Instead, the beneficiary acts as a first-line supervisor over non-professional employees while also providing the sale of services to other companies.

This matter will be remanded for the purpose of a new decision. The director must afford the petitioner reasonable time to provide evidence that is pertinent to the above issues, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility.

ORDER: The director's decision of July 3, 2002 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.